

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA  
FOR THE USE OF SALINAS  
CONSTRUCTION, INC., et al.,

Plaintiffs,

V.

WESTERN SURETY COMPANY, et  
al.,

## Defendants.

CASE NO. C14-1963JLR

## ORDER ON MOTIONS FOR A BILL OF COSTS

## I. INTRODUCTION

Before the court are two motions for a bill of costs by (1) Defendants Western Surety Company and CJW Construction, Inc. (CJW Mot. (Dkt. # 111)), and (2) Plaintiff Salinas Construction, Inc., and Counterclaim-Defendant Fidelity and Deposit Company of Maryland (Salinas Mot. (Dkt. # 113)). Having considered the parties' motions, the

1 briefing filed in opposition thereto and support thereof,<sup>1</sup> the relevant portions of the  
 2 record, and the applicable law, the court GRANTS in part and DENIES in part CJW and  
 3 Western's motion and DENIES Salinas and Fidelity's motion.

4 **II. BACKGROUND & ANALYSIS**

5 In a jury trial lasting from March 14 to March 18, 2016, the parties tried a contract  
 6 dispute arising out of a construction project at Joint Base Lewis McChord. (See Dkt.  
 7 ## 60-63, 65.) Salinas, the subcontractor, contended that CJW, the general contractor,  
 8 breached the parties' contract in three ways: (1) by interfering with and hindering  
 9 Salinas's performance of its work at the project (the "interference claim"); (2) by  
 10 requiring Salinas to remove and replace cracked concrete (the "cracked concrete claim");  
 11 and (3) by failing to pay Salinas for the extent of its work (the "underpayment claim").<sup>2</sup>  
 12 (See Verdict Form (Dkt. # 68) at 2; Pretrial Order at 1-2.) Salinas obtained a favorable  
 13 verdict on its interference claim and its underpayment claim. (See Verdict Form at 2-3.)  
 14 The jury awarded Salinas \$216,300.00 of the \$425,388.00 that Salinas sought based on  
 15 its interference claim and the entire \$11,187.00 that Salinas sought based on its  
 16 underpayment claim. (*Id.*; Salinas Trial Br. (Dkt. # 47) at 11.) However, on July 7,  
 17 2016, the court concluded that Salinas supported its interference claim with insufficient  
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19 <sup>1</sup> Neither party has requested oral argument, and the court finds it unnecessary to the  
 disposition of this motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

20 <sup>2</sup> Western is CJW's surety on its payment bond associated with the project. (Pretrial  
 21 Order (Dkt. # 58) at 3.) Fidelity is Salinas's surety on its performance bond. (*Id.* at 4.) For ease  
 22 of reference, and because for purposes of this motion each surety is entitled to the same relief as  
 its principal, the court refers principally to the contractors, CJW and Salinas, in deciding this  
 motion.

1 admissible evidence and vacated the jury's award on that claim. (7/7/16 Order (Dkt.  
2 # 109).) The final judgment accordingly awards Salinas only \$11,187.00 on its  
3 underpayment claim. (Am. Judgment (Dkt. # 110).) CJW prevailed at trial on its only  
4 counterclaim, and the jury awarded CJW \$36,102.92 in damages. (Verdict Form at 4;  
5 Am. Judgment at 1.)

6 **A. "Prevailing Party"**

7 The parties now dispute which parties, if any, are the prevailing party for purposes  
8 of billing costs. (CJW Mot. at 1 (citing Fed. R. Civ. P. 54(d)(1)); Salinas Mot. at 1  
9 (same).) Rule 54(d)(1) provides:

10 Unless a federal statute, these rules, or a court order provides otherwise,  
11 costs—other than attorney's fees—should be allowed to the prevailing  
12 party. But costs against the United States, its officers, and its agencies may  
13 be imposed only to the extent allowed by law. The clerk may tax costs on  
14 14 days' notice. On motion served within the next 7 days, the court may  
15 review the clerk's action.

16 Fed. R. Civ. P. 54(d)(1). Although the rule creates a presumption favoring granting costs  
17 to the prevailing party, "the decision whether to award costs ultimately lies within the  
18 sound discretion of the district court." *Marx v. Gen. Revenue Corp.*, --- U.S. ---, 133  
19 S. Ct. 1166, 1172 (2013).

20 Rule 54(d), however, provides no guidance on how to determine the prevailing  
21 party in instances of a mixed verdict involving counterclaims. *See* Fed. R. Civ. P.  
22 54(d)(1). Here, common sense allows for only one conclusion. CJW completely  
prevailed over Salinas's \$425,388.00 claim, which was the focal point of the trial;  
Salinas's \$108,410.00 cracked concrete claim; and CJW's \$36,102.92 counterclaim that

1 Salinas disputed. (See Verdict Form; Am. Judgment; Salinas Trial Br. at 11-13.) Salinas,  
 2 in contrast, prevailed only on its underpayment claim for \$11,188.00, which CJW all-but  
 3 conceded at trial. (Verdict Form at 1.) Salinas sought a total of \$544,986.00 from CJW  
 4 at trial. (Salinas Trial Br. at 13.) Instead, ignoring the sureties' interests and obligations,  
 5 Salinas owes CJW a net total of \$24,915.92. (See Am. Judgment.) CJW is the prevailing  
 6 party.<sup>3</sup>

7 **B. Available Costs**

8 Salinas also contends that even if CJW is the prevailing party, CJW is not entitled  
 9 to all of the costs it seeks. (Salinas Resp. at 2.) The following types of costs are  
 10 available to a prevailing party:

11 (1) Fees of the clerk and marshal; (2) Fees for printed or electronically  
 12 recorded transcripts necessarily obtained for use in the case; (3) Fees and  
 13 disbursements for printing and witnesses; (4) Fees for exemplification and  
 14 the costs of making copies of any materials where the copies are necessarily  
 15 obtained for use in the case; (5) Docket fees under section 1923 of this title;  
 16 (6) Compensation of court appointed experts, compensation of interpreters,  
 17 and salaries, fees, expenses, and costs of special interpretation services  
 18 under section 1828 of this title.

19 28 U.S.C. § 1920. CJW seeks a total of \$21,313.51 in costs. (Bill of Costs (Dkt.  
 20 # 111-1) at 1.) Of that amount, CJW seeks \$13,817.01 in “[f]ees for exemplification and

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21 <sup>3</sup> Salinas bases its argument that it was the prevailing party on the premise that “the  
 22 Court’s ruling on CJW’s [Rule] 50(b) motion was made in error.” (Salinas Mot. at 2.) However,  
 Salinas has not appealed this matter, and its deadline to do so has passed. (See Am. Judgment at  
 2 (“Filed this 7th day of July, 2016.”)); Fed. R. App. P. 4(a)(1)(A); (see also Salinas Reply (Dkt.  
 # 117) at 1 (“Given costliness of appeal and its already depleted litigation funds, Salinas has  
 chosen not to appeal the Court’s decision.”).) Moreover, Salinas cites no authority for its  
 argument that the jury’s verdict should govern post-trial motions even where the court has  
 granted a motion pursuant to Rule 50. The court therefore finds Salinas’s argument  
 unpersuasive.

1 the costs of making copies of any materials where the copies are necessarily obtained for  
2 use in the case." (*Id.*); 28 U.S.C. § 1920(4).

3 Salinas takes issue only with CJW's exemplification and copying costs. (Salinas  
4 Resp. at 3-4); *see* 28 U.S.C. § 1920(4). Specifically, Salinas argues that CJW has  
5 claimed exemplification and copying costs for preparing discovery productions, quality  
6 control of discovery productions, analyzing electronic information, building trial exhibit  
7 sets, and conferring with a paralegal. (Salinas Resp. at 3 (citing Bill of Costs at 15-18,  
8 24-25).) According to Salinas, CJW included unrecoverable "intellectual" tasks such as  
9 "compil[ing] discovery, prepar[ing] trial exhibits, and conferr[ing] with paralegals" in the  
10 exemplification and copying section of its bill of costs. (*Id.* at 4 (citing *Zuill v.*  
11 *Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996)).) Furthermore, Salinas argues that CJW  
12 failed to segregate recoverable and unrecoverable exemplification and copying costs.  
13 (*Id.*) Salinas therefore asks the court to preclude entirely CJW's recovery of  
14 exemplification and copying costs. (*Id.*)

15 Salinas's characterization of CJW's request for exemplification and copying costs  
16 is largely inaccurate. First, CJW provided itemized invoices with thorough descriptions  
17 to back up their request. (*See* Bill of Costs at 15-27.) Indeed, Salinas based its argument  
18 to exclude these costs on those descriptions. (*See* Salinas Resp. at 3-4 (citing Bill of  
19 Costs at 15-18, 24-25).) The detailed entries on the invoices belie Salinas's contention  
20 that the costs cannot be parsed into recoverable and unrecoverable amounts. Second, the  
21 manager of litigation technology at CJW's law firm, who oversees electronically stored  
22 information ("ESI") invoicing, has elucidated what the disputed descriptions entail.

1 (Hagen Decl. (Dkt. # 115) ¶ 2.) He confirms that the litigation technology department  
2 “does not review files for completeness, privilege, and/or responsiveness prior to  
3 production.” (*Id.* ¶ 3.) Instead, the department “intake[s] and process[es] electronic and  
4 hard copy records, ensure[s] they are text searchable, and load[s] the documents into a  
5 review database for improved search capabilities.” (*Id.*) These actions are not  
6 “intellectual” in the way Salinas argues. The subsequent explanations likewise confirm  
7 that the majority of CJW’s asserted exemplification and copying costs indeed fit under  
8 Section 1920(4), at least as that term has been interpreted in an increasingly digital age.  
9 (*Id.* ¶¶ 4-7); *see eBay Inc. v. Kelora Systems, LLC*, No. C 10-4947 CW (LB), 2013 WL  
10 1402736, at \*4 (N.D. Cal. Apr. 5, 2013) (“Congress amended section 1920 in 2008 to  
11 substitute ‘the costs of making copies of any materials’ for ‘the costs of copies of papers.’  
12 That pulled the electronic equivalent of papers into the arena of compensable costs under  
13 section 1920(4.”); *see also Split Pivot, Inc. v. Trek Bicycle Corp.*, 154 F. Supp. 3d 769,  
14 780-81 (W.D. Wis. 2015) (allowing e-discovery costs under Section 1920(4) “for Bates  
15 stamping, shipping and delivery of electronic documents, native file and email  
16 conversion, and TIFF image creation and conversion”).

17 CJW concedes, however, that one of the costs it initially sought is not  
18 recoverable—its ESI team’s conference with Ms. Vannoy, who is apparently a paralegal.  
19 (CJW Reply (Dkt. # 114) at 3 (citing Bill of Costs at 25).) CJW therefore requests that  
20 the court grant its motion but reduce the amount requested by \$525.00, which cost  
21 compensates the entire time entry containing the conversation with the paralegal. (*Id.*)  
22 Although the entirety of the \$525.00 need not be excluded, there is no way to allocate the

1 amount into recoverable and unrecoverable sums based on the invoice provided. (See  
2 Bill of Costs at 25.) The court therefore concludes that a \$525.00 reduction is  
3 appropriate, but that the other exemplification and copying costs that CJW seeks are  
4 recoverable.<sup>4</sup> Accordingly, the court GRANTS in part CJW and Western's motion  
5 subject to this reduction.

6 **III. CONCLUSION**

7 The court DENIES Salinas and Fidelity's motion (Dkt. # 113), GRANTS in part  
8 and DENIES in part CJW and Western's motion (Dkt. # 111), reduces CJW and  
9 Western's exemplification and copying costs by \$525.00, and AWARDS CJW and  
10 Western \$20,788.51 in total costs.

11 Dated this 2<sup>nd</sup> day of September, 2016.

12   
13 JAMES L. ROBART  
14 United States District Judge  
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22 <sup>4</sup> Salinas does not oppose the other categories of costs that CJW seeks, and the court finds  
those costs recoverable pursuant to Rule 54(d) and 28 U.S.C. § 1920(1)-(3), (5)-(6).